STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2005
v	No. 250723 St. Joseph Circuit Court
RANDY LEE WOLF, Defendant-Appellant.	LC No. 03-011513-FH

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle while under the influence of intoxicating liquor or with an unlawful blood alcohol level (OUIL/UBAL), third offense, MCL 257.625(1), (8). Defendant pleaded no contest to operating a motor vehicle with a suspended license, MCL 257.904. The trial court sentenced defendant as a third habitual offender to imprisonment for two years and ten months to ten years for the OUIL/UBAL conviction and forty-one days for the operating with a suspended license conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in denying his motion for directed verdict on the OUIL charge. We disagree. This Court reviews de novo a trial court's decision on a motion for a directed verdict. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). When reviewing a trial court's decision on a motion for a directed verdict, we must consider the evidence presented by the prosecutor in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime were proved beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences therefrom may be sufficient to prove the elements of the crime. *Jolly*, *supra* at 466.

According to defendant, the trial court erred in denying his motion for directed verdict because the evidence showed that defendant was driving his motor vehicle well and there was no evidence that he operated his motor vehicle poorly or that his ability to operate a motor vehicle was affected by his consumption of alcohol. MCL 257.625(1) provides, in relevant part:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor

vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:

(a) The person is under the influence of intoxicating liquor, a controlled substance, or a combination of intoxicating liquor and a controlled substance.

A person is considered to be "operating" a motor vehicle under MCL 257.625(1) if he "has put the vehicle in motion, or in a position posing a significant risk of causing a collision." *People v Wood*, 450 Mich 399, 405; 538 NW2d 351 (1995). Defendant does not dispute that he was operating a motor vehicle. However, he contends that absent evidence of poor driving, there was insufficient evidence that he was driving "under the influence of alcoholic liquor." MCL 257.625(1)(a).[1] We disagree.

A person can be convicted of OUIL if there is evidence that his "ability to drive was substantially and materially affected by consumption of intoxicating liquor." *People v* Lambert, 395 Mich 296, 305; 235 NW2d 338 (1975). In *People v Walters*, 160 Mich App 396, 402; 407 NW2d 662 (1987), this Court addressed the issue whether a person can be convicted of OUIL when he is observed operating or driving a motor vehicle in a normal fashion. In that case, we opined:

> [W]e conclude that the inability to drive normally is an element of the offense of OUIL and that evidence of the defendant's being able to drive normally is exculpatory. However, we cannot conclude that any evidence of normal driving, no matter how limited, mandates a verdict of acquittal. That is, where there is sufficient circumstantial evidence that, due to the consumption of alcohol, a defendant could not drive normally and there is also observational evidence that defendant drove normally for a limited distance, it is possible to conclude that the defendant was operating under the influence of an intoxicating liquor. However, the evidence of his ability to drive normally is relevant. [*Walters, supra* at 402.]

In the instant case, while there was evidence that defendant was driving normally before his vehicle was pulled over, there was sufficient evidence, both direct and circumstantial, that, due to the consumption of alcohol, defendant was operating the vehicle under the influence of intoxicating liquor. Following defendant's arrest, he consented to a blood alcohol test, which revealed that his blood alcohol level was .21. If a person has a blood alcohol level of .10 or more, "it is presumed that the defendant was under the influence of intoxicating liquor." MCL 257.625a(9)(c). In addition, Trooper Matthew Lackey testified that when he approached defendant's vehicle, defendant's eyes were watery and red and he noticed a strong odor of intoxicants coming from defendant's vehicle. Defendant admitted to Lackey that he had consumed approximately two to three beers and that he had finished the last beer about ten minutes before Lackey pulled his vehicle over. Lackey asserted that defendant had difficulty putting the vehicle into park. Lackey also testified that defendant swayed and had trouble

[1] The OUIL statute, MCL 257.625, does not define the phrase "under the influence of intoxicating liquor."

keeping his balance and that he did not step from his heel to his toe. Lackey asserted that defendant did not satisfactorily complete the field sobriety tests. In Lackey's opinion, defendant was too intoxicated to drive. Circumstantial evidence may sustain a conviction of OUIL. See *People v Smith*, 164 Mich App 767, 770; 417 NW2d 261 (1987). We conclude that even though there was evidence that defendant was driving normally before his vehicle was pulled over, there was sufficient direct and circumstantial evidence that defendant was operating his vehicle under the influence of intoxicating liquor. We therefore reject defendant's claim that, absent evidence of poor driving, there was insufficient evidence to sustain his OUIL conviction.

Defendant next argues that the cumulative effect of three errors deprived him of a fair trial. According to defendant, the trial court erred in sequestering all witnesses, in admitting the results of defendant's blood alcohol test when the foundation for the evidence was inadequate, and in failing to give the jury an instruction on UBAL. We disagree.

"The cumulative effect of several minor errors may warrant reversal where the individual errors would not." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). However, in order to reverse on the basis of cumulative error, the effect of the errors must be so seriously prejudicial that the defendant was denied a fair trial. *Id.*

Defendant contends that the trial court erred in sequestering the witnesses. Specifically, defendant contends that his expert witness should have been permitted to hear and evaluate the testimony of two prosecution witnesses who testified regarding the circumstances under which defendant's blood was drawn and analyzed. Defendant did not cite any legal authority to support his claim that the trial court erred in sequestering the witnesses. "[A] mere statement without authority is insufficient to bring an issue before this Court." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, unravel and elaborate for him his arguments, or search for authority to sustain or reject his position. *Id.*; *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Because defendant has cited no authority to support his claim of error, he has abandoned this issue on appeal. We therefore decline to address this claim of error.

Defendant next argues that the trial court erred in admitting the results of defendant's blood alcohol test because the testimony of Trooper Lackey was insufficient to establish a proper foundation for the admission of the results. Specifically, defendant contends, the testimony of the medically qualified individual who took the blood sample was required to establish a proper foundation for the admission of defendant's blood test results. The admission of chemical test results in a prosecution for OUIL/UBAL is authorized by MCL 257.625a(6). To be admissible, the test results must be both relevant and reliable. *People v Fosnaugh*, 248 Mich App 444, 450; 639 NW2d 587 (2001). In *People v Cords*, 75 Mich App 415, 427; 254 NW2d 911 (1977), this Court outlined nine rules concerning the admissibility of blood samples. In this case, the medical professional who drew defendant's blood sample did not testify at trial. However, Trooper Lackey testified regarding the foundational elements, and defendant did not object to Lackey's testimony. Defendant later objected before Kimberly Dailey, a forensic scientist for the Michigan State Police, testified regarding the results of defendant's blood alcohol test, arguing that before the results of a blood alcohol test are admitted into evidence, the person who drew the blood must lay a foundation for the admission of the evidence.

Contrary to defendant's claim on appeal, in *Cords*, this Court, reasoning that the rules governing the admissibility of the results of blood tests "were designed to insure that the blood tested was in fact that of the accused and to prevent the admission of test results obtained from an unreliable blood sample," rejected the use of "an inelastic rule requiring that compliance with the initial six criteria be established through the testimony of a physician or nurse." *Cords, supra* at 427-428. Similarly, in this case, we find that even without the testimony of the nurse who drew the blood, the purpose of the rules were served because Trooper Lackey's testimony "ensured the reliability of the blood sample and sufficient connected [the blood] sample with [defendant]." *Id.* at 428. The trial court therefore did not err in holding that there was a sufficient foundation for the introduction of the results of the blood test and admitting the results into evidence.

Defendant's final allegation of error constituting cumulative error concerns the trial court's instructions to the jury. According to defendant, the trial court erred in failing to instruct the jury on the alternative offense of UBAL. The trial court, apparently unaware that plaintiff had filed an amended information adding UBAL as an alternative theory under which defendant violated MCL 257.625(1), did not instruct the jury on UBAL in its preliminary instructions to the jury. Defendant failed to preserve this issue by objecting to the preliminary instruction. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Because defendant did not preserve this issue for appeal, we review the issue for plain error affecting defendant's substantial rights. *Gonzalez, supra* at 225. We conclude that there was no plain error in this case. While the trial court's preliminary instructions to the jury did not include a UBAL instruction, the trial court's instructions to the jury following the presentation of the evidence included an instruction on UBAL. Jury instructions are to be read in their entirety rather than extracted piecemeal to establish error. *Aldrich*, *supra* at 124. "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* We conclude that although the preliminary instructions were imperfect, the instructions, as a whole, sufficiently protected defendant's rights.

In sum, the errors defendant claims constituted cumulative error depriving him of a fair trial were not errors at all. Therefore, there were no errors to aggregate to deny defendant a fair trial. See *Mayhew, supra* at 128.

Defendant finally argues that he is entitled to resentencing for several reasons. First, defendant contends that the trial court erred in assessing him ten points for prior record variable 2 (PRV 2), prior low severity felony convictions. MCL 777.52. Appellate review of sentencing guidelines calculations is very limited. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). A sentencing court has discretion to determine the number of points to be scored, as long as there is evidence on the record that adequately supports a particular score. *Id.* A score of ten points is appropriate under PRV 2 if "[t]he offender has 2 prior low severity felony convictions." MCL 777.52(1)(c). PRV 2 reflects a policy determination that a longer sentence is warranted because it is not the first time that the offender was in trouble with the law. *People v Maben*, 208 Mich App 652, 655; 528 NW2d 850 (1995). Defendant does not dispute the fact that he has two prior low severity felony convictions, but argues that the trial court could not use those convictions as a basis for assessing him ten points for PRV 2 when the offenses had already been used to elevate his current offense to felony status under MCL 257.625(8) and to

charge him as a second habitual offender under MCL 769.11. According to defendant, assessing him ten points for PRV 2 constitutes impermissible "triple counting" of his prior convictions.

The only authority defendant cites in support of his argument on appeal is MCL 777.55(2)(a) and (b). According to defendant, MCL 777.55(2)(a) and (b) prohibit the consideration of his two prior convictions as a basis to assess ten points under PRV 2. MCL 777.55(2)(a) and (b) provide: "Do not count a prior conviction used to enhance the sentencing offense to a felony." Defendant's argument is unpersuasive, however, because MCL 777.55 applies to PRV 5 and not to PRV 2. Moreover, MCL 777.52, which applies to PRV 2, does not contain a similar prohibition. When statutory language is plain and unambiguous, the statute speaks for itself, and judicial construction is not permitted; the court's role is only to apply the terms of the statute to the circumstances of the case. *People v McIntire*, 461 Mich 147, 152-153; 599 NW2d 102 (1999). The judiciary is precluded from imposing different policy choices than those chosen by the Legislature. *Id.* at 153. Furthermore, in construing a statute, the omission of a provision in one part of a statute that is included in another part is presumed to be intentional. *Thompson v Thompson*, 261 Mich App 353, 362 n 2; 683 NW2d 250 (2004). Provisions not included by the Legislature should not be included by a court. *Id.* In enacting MCL 777.52, the Legislature chose not to include language prohibiting the use of his two prior convictions as a basis to assess ten points under PRV 2 if they had already been used to enhance the sentencing offense to a felony. Because the Legislature did include such language in other parts of the prior record variable scoring statutes, see, e.g., MCL 777.55(2), we presume the Legislature's failure to include such language in MCL 777.52 was intentional. *Thompson*, *supra* at 362 n 2.

Because the only authority cited by defendant applies to PRV 5, and not to PRV 2, we deem this issue waived on appeal. "[A] mere statement without authority is insufficient to bring an issue before this Court." *Wilson*, *supra* at 243. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, unravel and elaborate for him his arguments, or search for authority to sustain or reject his position. *Id.*; *Leonard*, *supra* at 588.

Defendant next argues the trial court erred in denying his motion to quash the third offense notice in the felony information. According to defendant, the felony information is defective because even though the offenses and the dates specified were correct, the information improperly stated that defendant was convicted in district court, when, in fact, he was convicted in circuit court. Defendant asserts that the information was therefore defective under MCL 257.625(14). We disagree.

This Court reviews a trial court's decision on a motion to quash a felony information de novo to determine if the district court abused its discretion in ordering bindover. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). We reject defendant's claim that the trial court erred in refusing to quash the information based on the prosecutor's noncompliance with MCL 257.625(14). MCL 257.625(14) requires the prosecuting attorney to "include on the complaint and information . . . a statement listing the defendant's prior convictions." MCL 257.625(14) does not require the conviction listing to include the court from where the convictions originated. The felony information contained a listing of defendant's prior convictions as required by MCL 257.625(14). Even if the court that defendant was convicted in was improperly named, the conviction listing nonetheless complied with MCL 257.625(14). We

therefore conclude that the trial court did not err in denying defendant's motion to quash the information.

Defendant finally argues that the trial court erred in denying his motion to quash the habitual offender notice and in sentencing him as a third habitual offender under MCL 769.11 because the dates of the offenses are incorrect in the information, and due process requires a supplemental information to contain the dates of the convictions alleged and the precise charges so that the defendant is properly apprised of the charge he faces as an habitual offender. We disagree. MCL 769.13(2) requires the prosecuting attorney to file a notice of intent to seek an enhanced sentence with a "list [of] the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement." However, MCL 769.13(2) does not require the court to list a specific date for the prior convictions. Defendant does not dispute that he received notice of the prosecutor's intent to seek an enhanced sentence, but merely argues that the dates of the prior offenses were incorrect in the information. Under the circumstances, we find that defendant's ability to respond to the habitual offender charge was not prejudiced by any incorrect dates in the notice. See *People v Walker*, 234 Mich App 299, 314-315; 593 NW2d 673 (1999). Any error in the dates of the offenses in the information was harmless. *Id.* at 314.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello